St. John's Law Review

Volume 3, May 1929, Number 2 Article 19

Evidence--Crimes--Assault--Trial (People v. Malkin, 250 N.Y. 185 (1929))

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tinguished from the physical;[1] where there has been a malicious invasion of the rights of another, damages being allowed not alone as compensation but by way of punishment of the wrongdoer.[2] Courts in a few jurisdictions permit recovery for mental anguish caused by the negligence of telegraph companies in failing to deliver messages relating to sickness and death.[3] The reason for departure from the common law rule is that "the telegraph is a public utility of modern invention, endowed by the state with special privileges, and charged with public duties; that neglect by its managers and operators in the performance of these duties may cause mental anguish to those it is required to serve.[4]

EVIDENCE—CRIMES—ASSAULT—TRIAL.—Two of the defendants, Malkin and Franklin, were arrested immediately after a raid upon a fur store, and identified by their victims. The other defendants were arrested on information of one who had confessed his guilt and been convicted. The attack in question arose out of the fur strike of 1926, all defendants being members of the Joint Board Furriers' Union. Defendants appeal from a judgment of conviction, alleging that the District Attorney's conduct during trial was prejudicial. *Held,* as to all but Malkin and Franklin, decree reversed. People v. Malkin, 250 N. Y. 185 (1929).

The evident purpose of the prosecutor was to show that the defendants were men prone to violence, and who, for that reason had been condemned as a body by the American Federation of Labor. He offered no evidence of prior assaults by defendants,[1] yet he questioned as to previous acts and confronted them with seven silent witnesses propounding questions upon acts done in company with them. The relations of the defendants with the A. F. of L. and their expulsion therefrom were also a subject of examination by the prosecuting attorney. All this was done over proper objection.

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[1] Railway Commissioners v. Coultas, 13 App. Cas. 222; Lynch v. Knight, 9 H. L. Cas. 577; Hobbs v. London, S. W. Ry. Co., 10 Q. B. 122.

[2] Larson v. Chase, 47 Minn. 307, 50 N. W. 238 (1891); Francis v. Tel. Co., 58 Minn. 252, 59 N. W. 1078 (1894); Railroad Co. v. Stabler, 62 Ill. 313 (1872).

[3] So. Relle v. Western Union Tel. Co., 55 Tex. 308, 40 Am. Rep. 805 (1881). The first adjudication to promulgate the minority rule. Adopted in following states: Alabama, Western Union Tel. Co. v. Henderson, 89 Ala. 510, 7 So. 419 (1890); Iowa, Mentzer v. Western Union Tel Co., 93 Iowa 752, 62 N. W. 1 (1895); Kentucky, Taliferro v. Western Union Tel. Co., 21 Ky. L. Rep. 1290, 54 S. W. 825 (1900); Nevada, Barnes v. Western Union Tel. Co., 27 Nev. 438, 76 Pac. 931 (1904); North Carolina, Young v. Western Union Tel. Co., 107 N. C. 370, 11 S. E. 1044 (1890); Tennessee, Wadsworth v. Western Union Tel. Co., 86 Tenn. 695, 8 S. W. 574 (1888).

[4] Rowan v. Western Union Tel. Co., 149 Fed. 550 (C. C. N. D. Iowa 1907) at 552. This case along with the other cases in the Federal Courts and other jurisdictions holding to the majority rule have vigorously maintained that there is no sufficient reason for making an exception to the common law rule in the case of actions against telegraph companies.

[1] People v. Molineux, 168 N. Y. 264, 61 N. E. 286 (1901).

The questions as to previous acts unproved were erroneously allowed since they were mere charges and there was no proof of guilt.[2] Though the cross-examiner is bound by the answers in such case, the denial does not render the question harmless.[3] The prosecutor cannot lawfully create a false impression by questions containing no element of misconduct and by parading witnesses as a challenge to the defendants.[4] It was not only error to show defendant's expulsion from the A. F. of L.[5] but such error was aggravated by suggesting that the action was motivated by defendants' acts of violence. Defendants had no opportunity to controvert and such alleged finding was not made by a court of justice.

Limitation upon the mode of questioning is ordinarily within the discretion of the trial court, but when the obvious purpose of questions is to create the impression that the witnesses are lying, then permissive rulings made over objections constitute errors of law, not judgment.[6]

PARTNERSHIP — JOINT VENTURES — FIDUCIARIES — LEASES — TRUSTS.—Plaintiff and defendant were joint adventurers in the exploitation of a lease obtained by the latter for a period of twenty-two years. Plaintiff by virtue of his moneyed contribution was to share the losses and participate in the profits, but sole management and control were to be exercised by defendant. Shortly before the expiration of the term defendant, without communicating with his co-adventurer, secured in the name of a company owned by him, a new lease of a large tract of land including the property originally leased. In an action to impress the lease with a trust, *Held,* for the plaintiff, Meinhard v. Salmon, 250 N Y. (1929).

Co-adventurers are held to the same high degree of honesty and loyalty as partners.[1] A partner cannot take a renewal of a lease for his own benefit,[2] though a purchase, in good faith, of the reversion is allowed.[3] Salmon, being in control, occupied a position of trust and confidence and could not, despite the utmost good faith, gain any advantage not shared by Meinhard.[4] Extensions and renewals were

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[2] People v. Irving, 95 N. Y. 541 (1884); People v. Crapo, 76 N. Y. 288 (1879).

[3] People v. Slover, 232 N. Y. 264, 133 N. E. 633 (1921).

[4] People v. Freeman, 203 N. Y. 267, 96 N. E. 413 (1911).

[5] Nolan v. Brooklyn City & N. R. Co., 87 N. Y. 63, 68 (1881).

[6] *Supra* Note 4.

[1] King v. Barnes, 109 N. Y. 267 (1888).

[2] Mitchell v. Reed, 61 N. Y. 123 (1874).

[3] See Anderson v. Lemon, 8 N. Y. 236, 237 (1853). Cf. Mitchell v. Reed, *supra* Note 2.

[4] Lindley, Partnership, 495; Comstock v. Buchanan, 57 Barb. 127, 140 (1864).